Supreme Court, U.S.
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**IN THE SUPREME COURT
OF THE UNITED STATES**

October Term, 1995

MARY BEDDINGFIELD, JANET COCCHI,
JUDY DICK and VALERIE ZYSKOWSKI,

Petitioners,

-against-

COUNTY OF ALLEGHENY, CITY OF PITTSBURGH;
CHARLES R. KOZAKIEWICZ and MAYER DeROY,

Respondents.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

Dated: New York, New York
November 20, 1995

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51 pp

Question Presented

1. Is the "final judgment" rule, as applied by this Court to federal appeals from orders denying class certification in Coopers & Lybrand v. Livesay, 437 U.S. 463, 470 (1978) and the longer period prior to appeal caused by said rule under 28 U.S.C. 1291, a "convincing" reason, or even a cognizable reason, under this Court's decision in Fidelity Union Trust v. Field, 311 U.S. 169 (1940), sufficient to relieve a federal court in a federal civil rights action from its obligation under this Court's precedent in Chardon v. Fumero Soto, 462 U.S. 650, 657 (1983) to follow an intermediate state court precedent which tolled the state's applicable statute of limitations during appeal from state court orders denying class certification, on the sole ground that, if the state court precedent were followed, the tolling period under federal procedure would be longer than the tolling period under state procedure?

Parties

All of the parties herein are natural persons or municipalities, except that Allegheny County is insured by a wholly-owned subsidiary of a publicly-traded corporation, Xerox Corporation. The same is true of non-petitioning parties in the lower courts: Tammy Nelson, Arleigh Eddy, Ida Kaufman, Sandy Saunders and Donna Skuta. Mayer DeRoy died while the petition for certiorari was in preparation.

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On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Third Circuit

Petitioners respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Jurisdiction

The judgment of the Court of Appeals was entered on July 18, 1995. A petition for rehearing (not en banc) was timely filed and the Court of Appeals denied said petition on August 10, 1995. This petition was submitted to this Court for filing within 90 days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Opinions Below

The opinions of the District Court and the Court of Appeals are annexed hereto and are reported at 860 F.Supp. 1080 and 60 F.3d 1010.

STATEMENT OF THE CASE

In this case, the question pivotal to the civil rights of petitioners arises under this Court's decision in Fidelity Union Trust v. Doe, 311 U.S. 169 (1940) ("Fidelity"). Under the rules of that decision, where state law is controlling on a particular issue, a federal court must apply the decisional law of the state's intermediate appellate courts unless there is "convincing" reason to believe that the highest court in the state would overrule the intermediate state court decisions.

Both the District Court and the Court of Appeals recognized their duty as federal courts applying the decisional law of Pennsylvania, although neither opinion expressly cited or discussed Fidelity. Each court declined to follow intermediate state court decisions directly in point solely because of a federal procedural rule. There was no suggestion by either court that the Supreme Court of Pennsylvania would overrule the intermediate state court decisions or otherwise decline to follow them in a state procedural context.

Petitioners are four women demonstrators out of a group of sixty in a federal civil rights action alleging excessive force an aggravated sexual harassment in the Allegheny County Jail, located in the City of Pittsburgh, Pennsylvania. Both County and City personnel are alleged to have participated. One County and one City supervisory official is each joined in his official and individual capacities.

From the outset, the case has been the subject of deep embarrassment an reluctance to sue on the part of the sixty women involved because of the type of conduct which they allege occurred on the night of March 11, 1989, the date of the demonstration in front of a private abortion clinic.

On February 21, 1991, eighteen days before the expiration of the two-year Pennsylvania statute of limitations applicable to their claims, one organizational

plaintiff and four of the individual women, using fictional names, filed a federal civil rights action in the Western District of Pennsylvania, Pittsburgh division. Class certification was sought to protect the rights of the other fifty-six women. The true names of all sixty women were provided to the District Court in camera to protect the privacy of the women involved.

When the District Court denied plaintiffs' motion for class certification, the rights of the absent class members were discussed at a status conference. The District Court asked counsel for the parties for a calculation of the tolling period under this Court's decision in American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974). Plaintiff's counsel wrote to the District Court giving 18 days as the expiration of the statute of limitations under American Pipe but stated that he would rely on this Court's decision in Chardon v. Fumero Soto, 462 U.S. 650, 657 (1983) and decisions of the Pennsylvania intermediate appellate courts. The Pennsylvania precedents tolled the state statute of limitations pending appeal from an order denying class certification.

Prior to the expiration of the statute of limitations calculated under American Pipe, supra, two more women were added to the complaint by amendment, both using fictional names.

Two years later, the District Court resolved a series of motions to dismiss made by the Respondents. The Court, inter alia, dismissed all but plaintiffs' claims under 42 U.S.C. 1983 and directed that plaintiffs who desired to pursue said claims must use their true names. The Court declined to rule on the effect of the statute of limitations, as applied to the remaining 54 women, until the question was directly presented.

In accordance with the District Court's decision, plaintiffs' counsel disclosed all sixty names to Respondents. Thereafter, at the direction of the District Court, plaintiffs' counsel filed an amended complaint and made a motion to intervene. Petitioners are four of the remaining 54 women: JANET COCCHI and MARY BEDDINGFIELD were added by amendment to the complaint; JUDY DICK and MARY BEDDINGFIELD moved to intervene. Respondents moved to dismiss the Petitioners added by amendment and to dismiss the motion to intervene, asserting that the claims of all four Petitioners were barred by the applicable statute of limitations.

The District Court recognized its duty to follow the decisions of the intermediate appellate courts of the State of Pennsylvania unless there was reason to believe that they would not be approved by the Supreme Court of Pennsylvania.

Petitioners had relied on Miller v. Federal Kemper Ins. Co., 508 A.2d 1222 (Pa. Super. Ct., 1986) and its progeny, which held that the state statute of limitations is tolled during the pendency of the class representatives' appeal from the order denying class certification.

As noted by the Court of Appeals in its slip opinion, at p. 6,

> "The district court declined to follow the Miller panel, noting the different appellate procedures followed by Pennsylvania and the federal courts. Pennsylvania courts treat the denial of class certification as a final order from which an appeal may be taken immediately, Alessandro, 409 A.2d at 350. Denial of class certification by a federal court, however, is interlocutory and ordinarily not immediately appealable. Coopers & Lybrand v. Livesay, 437 U.S. 463, 470 (1978). Thus, in state court proceedings, there is some logic to continuing the tolling period while the certification decision is resolved. But in federal court, such a continuation would result in a substantial extension of the tolling period. The district court found that this distinction made application of the Superior Court's rule to cases in federal courts unreasonable. We agree.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals is Directly Contrary to this Court's Decision in Fidelity Union Trust v. Field, 311 U.S. 169 (1940), in that the Third Circuit has Undertaken to Determine the Tolling Effect of the Pennsylvania Limitations Tolling Period on its own Reasoning Independent of the Construction and Effect Which the State itself Accorded to Its Own Statute of Limitations.

In the Court of Appeals, Petitioners cited this Court's decision in Fidelity Union Trust v. Field, 311 U.S. 169 (1940), in its Reply Brief and, when the Court of Appeals failed to address that decision in its opinion, in their petition for rehearing (not en banc), denied August 10, 1995.

Petitioners had relied upon an intermediate state appellate court decision directly in point, Miller v. Federal Kemper Ins. Co., 508 A.2d 1222 (Pa. Super. Ct., 1986) and there is no conflict of decision in the state courts of Pennsylvania on that point. Nor is any conflict claimed or any criticism of the precedent on which petitioners relied for the tolling effect of the Pennsylvania statute of limitations.

In relying on the state court decisions, Petitioners were following this Court's decision in Chardon v. Fumero Soto, 462 U.S. 650, 657 (1983), as expressly acknowledged by the Court of Appeals. It follows that the decision of the Court of Appeals is contrary to that decision as well.

Both the District Court and the Court of Appeals expressly relied on their own reasoning, which was independent of the reasoning of any state court which had addressed the same issue. Reference to the Supreme Court of Pennsylvania in the opinions of both lower courts was hypothetical and speculative because, as acknowledged by both lower courts, the question of application of federal appellate procedure had never been decided. Indeed, the question was one of first impression in the Third Circuit.

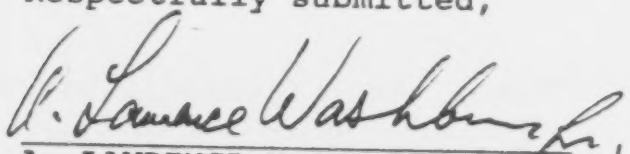
Even today, the precedent relied upon by Petitioners and the state court cases which have followed it stand as the only exposition of the law of the State on the question involved. Thus, the factual setting is identical to the one presented by the third Circuit's decision which was reversed by this Court in Fidelity Union Trust v. Field, supra.

CONCLUSION

Since the decision of the Court of Appeals is directly contrary to the decision of this Court in Fidelity Union Trust v. Field, supra, the Petitioners pray that this Petition be granted and the judgment of the Court of Appeals be reversed and remanded for further proceedings consistent with this Court's decision in Fidelity Union Trust v. Field, supra.

Dated: New York, New York
November 20, 1995

Respectfully submitted,



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UNITED STATES COURT
OF APPEALS FOR THE
THIRD CIRCUIT

No. 94-3511

TAMMY NELSON (J.D. #10);
ARLEIGH EDDY (J.D. #17);
IDA KAUFMAN (J.D. #26);
SANDY SAUNDERS (J.D. #47);
DONNA SKUTA (J.D. #52);
JANET COCCHI (J.D. #12); and
MARY BEDDINGFIELD (J.D. #7);

Plaintiffs,

v.

COUNTY OF ALLEGHENY (the "County");
CHARLES R. KOZAKIEWICZ, Warden
of the Allegheny County Jail;
CITY OF PITTSBURGH (the "City");
MAYER DEROY, Assistant Chief of the
City Lock-Up at the time of the incidents complained of, being sued in
their official and individual capacities,

Defendants-Appellees,

JUDY DICK,* (J.D. #16);
VALERIE ZYSKOWSKI,* (J.D. #60);
JANET COCCHI (J.D. #12); and
MARY BEDDINGFIELD (J.D. #7);
(*Pursuant to Rule 12(a), F.R.A.P.)

Appellants.

(D.C. Civil Action No. 91-cv-00316)

SUR PETITION FOR PANEL REHEARING

Present: BECKER, SCIRICA
and WOOD*, Circuit Judges

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court, and no judge who concurred in the decision having asked for rehearing, and none of the members of the panel having voted for rehearing, the petition for rehearing is denied.

BY THE COURT,

Circuit Judge

Dated: August 10, 1995

* The Honorable Harlington Wood, Jr., United States Circuit Judge for the Seventh Judicial Circuit, sitting by designation.

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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 94-3511

TAMMY NELSON (J.D. #10);
ARLEIGH EDDY (J.D. #17);
IDA KAUFMAN (J.D. #26);
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DONNA SKUTA (J.D. #52);
JANET COCCHI (J.D. #12); and
MARY BEDDINGFIELD (J.D. #7);

Plaintiffs,

v.

COUNTY OF ALLEGHENY (the "County");
CHARLES R. KOZAKIEWICZ, Warden
of the Allegheny County Jail;
CITY OF PITTSBURGH (the "City");
MAYER DEROY, Assistant Chief of
the City Lock-Up at the time of the
incidents complained of, being sued in
their official and individual capacities,

Defendants-Appellees,

JUDY DICK,* (J.D. #16);
VALERIE ZYSKOWSKI,* (J.D. #60);
JANET COCCHI (J.D. #12); and
MARY BEDDINGFIELD (J.D. #7);
(*Pursuant to Rule 12(a), F.R.A.P.)

Appellants.

On Appeal from the United States District Court for the Western District of Pennsylvania
(D.C. Civil Action No. 91-cv-00316)

Present: BECKER, SCIRICA and WOOD*, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel March 7, 1995.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered August 15, 1994, be, and the same is hereby affirmed. Costs taxed against appellants. All of the above in accordance with the opinion of this Court.

ATTEST:
Clerk

Dated: July 18, 1995

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* The Honorable Harlington Wood, Jr., United States Circuit Judge for the Seventh Judicial Circuit, sitting by designation.

alw/pbg9506a&b

UNITED STATES COURT
OF APPEALS FOR THE
THIRD CIRCUIT

No. 94-3511

TAMMY NELSON (J.D. #10);
ARLEIGH EDDY (J.D. #17);
IDA KAUFMAN (J.D. #26);
SANDY SAUNDERS (J.D. #47);
DONNA SKUTA (J.D. #52);
JANET COCCHI (J.D. #12); and
MARY BEDDINGFIELD (J.D. #7);

Plaintiffs,

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COUNTY OF ALLEGHENY (the "County");
CHARLES R. KOZAKIEWICZ, Warden
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CITY OF PITTSBURGH (the "City");
MAYER DEROY, Assistant Chief of the
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JANET COCCHI (J.D. #12); and
MARY BEDDINGFIELD (J.D. #7);
(*Pursuant to Rule 12(a), F.R.A.P.)

Appellants.

(Filed July 18, 1995)

On Appeal from the United States
District Court for the
Western District of Pennsylvania
(D.C. Civil Action No. 91-cv-00316)

Argued March 7, 1995

Before: BECKER, SCIRICA
and WOOD*, *Circuit Judges*

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* The Honorable Harlington Wood, Jr., United States Circuit Judge for the Seventh Judicial Circuit, sitting by designation.

(Filed July 18, 1995)

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OPINION OF THE COURT

SCIRICA, *Circuit Judge*.

For claims subject to federal statutes of limitations, commencement of a class action tolls the running of the statute for all purported members of the class, but upon denial of class certification, the tolling period ends. In this appeal we must decide whether the Pennsylvania Supreme Court would continue the tolling period of a state statute of limitations beyond a district court's denial of class certification until appeals of that denial are exhausted. We also must decide whether Rule 15(c) of the Federal Rules of Civil Procedure would permit relation back of an amendment to a pleading that names new plaintiffs after expiration of the statute of limitations when those new plaintiffs are neither substituted nor have shown mistake concerning identity. We will affirm the order of the district court dismissing plaintiffs' claims.

I.

On March 11, 1989, anti-abortion protestors demonstrated on the grounds of a private clinic in Pittsburgh and blocked patient access to the facility. Pittsburgh police arrested about sixty female protestors and took them to a city holding facility until their transfer to the Allegheny County jail. They were detained overnight and released the next day.

On February 21, 1991 -- eighteen days short of the two-year anniversary of the protest -- this lawsuit was filed, as a class action by a representative on behalf of all the women arrested and by four protestors asserting individual claims. The lawsuit alleges that the city and county and their employees, through their actions in arresting and detaining the women, violated the protestors' civil rights under 42 U.S.C. §1983[1]. The district court denied a motion for certification of a plaintiff class on November 22, 1991. Eighteen days later, on December 10, the protestors filed a third amended complaint that included two more women asserting individual claims.

After the passage of two more years, and five years after the demonstration at

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1 The protestors also asserted various other claims that the district court dismissed.

issue, the protestors filed a fourth amended complaint on March 17, 1994. This latest complaint named five of the six women who had previously asserted individual claims (one woman chose voluntarily to dismiss her claims) and added two more plaintiffs, Janet Cocchi and Mary Beddingfield. On May 31, 1994, two additional protestors, Judy Dick and Valerie Zyskowski, filed a joint motion to intervene as party plaintiffs.

Defendants then moved to dismiss the claims of Cocchi and Beddingfield and to strike the motion of Dick and Zyskowski to intervene. The district court granted the motions, holding that the four women's claims were barred by the applicable statute of limitations. Cocchi, Beddingfield, Dick and Zyskowski appeal.

II.

The district court had jurisdiction of this case under 28 U.S.C. §1331 (1988) and §1343(1)(3)-(a)(4) (1988). We have jurisdiction if the district court's orders constitute "final decisions" under 28 U.S.C. §1291 (1988). The determination that appellants' claims are barred by the statute of limitations is a final and reviewable decision. See Green v. Humphrey Elevator & Truck Co., 816 F.2d 877, 878 n.4 (3d Cir. 1987) ("order dismissing the complaint in the instant action is final and thus reviewable ... because the statute of limitations on appellant's cause of action has run").

We exercise plenary review over a district court's dismissal of a complaint. *See* Moore v. Tartler, 986 F.2d 682, 685 (3d Cir. 1993); Napier v. Thirty or More Unidentified Fed. Agents, 855 F.2d 1080, 1085 (3d Cir. 1988). Although we generally review dispositions of motions to intervene for abuse of discretion, Brody ex rel. Sugzdinis v. Spang, 957 F.2d 1108, 1115 (3d Cir. 1992), the district court here did not exercise discretion in denying the motion to intervene, but barred the claims because of its legal conclusion that the statute of limitations had expired. In these circumstances, we conduct plenary review. *See* American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 560 (1974) ("In denying permission to intervene in this case, however, Judge Pence did not purport to weigh the competing considerations in favor of and against intervention, but simply found that the prospective intervenors were absolutely barred by the statute of limitations. This determination was not an exercise of discretion, but rather a conclusion of law...."). Similarly, "[W]e have plenary review of the district court's choice and interpretation of applicable tolling principles and its conclusion that the facts gave rise to a tolling of the statute of limitations". Sheet Metal Workers, Local 19 v. 2300 Group, Inc., 949 F.2d 1274, 1278 (3d Cir. 1991). Finally, our review of the district court's construction of Pennsylvania law is *de novo* a district court's determination of state law"); Grimes v. Vitalink Communications Corp., 17 F.3d 1553, 1557 (3d Cir.)

("The determinations regarding state law, where appropriate, will be reviewed *de novo*"), *cert. denied*, 115 S. Ct. 480 (1994).

III.

Because Congress did not establish a statute of limitations applicable to §1983 actions brought in federal court, federal district courts must "borrow" state laws of limitations governing analogous state causes of actions. Board of Regents v. Tomanio, 446 U.S. 478, 483-85 (1980) (citing 42 U.S.C. §1988 and numerous cases). Furthermore, "the practice of `borrowing' state statutes of limitations `logically include[s] rules of tolling'". Chardon v. Fumero Soto, 462 U.S. 650, 657 (1983) (citing Tomanio, 446 U.S. at 485). The parties agree that Pennsylvania's two-year statute of limitations applies to the plaintiffs' §1983 claims here and that the running of the statute properly was tolled when the class action was filed. The parties dispute, however, the duration of the tolling period applicable to claims of class members.

The Pennsylvania Supreme Court approves tolling the running of statutes of limitations while eligible class members are putative parties to a class action. *See* Alessandro v. State Farm Mut. Auto. Ins. Co., 409 A.2d 347, 350 n.9 (Pa. 1979).

The United States Supreme Court has held that such tolling protects both intervenors and purported class members who later file individual actions. Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 350 (1983); American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1974)[2]. The dispute here concerns when such tolling stops. The defendants argue the tolling period ended when the district court denied certification of the class. Plaintiffs contend that tolling should have continued until the class representative's appeal of the denial was exhausted.

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2 Pa. R. Civ. P. 1701(a) defines a class action as, "[A]ny action brought by or against parties as representative of a class until the court by order refuses to certify it as such or revokes a prior certification under these rules". The 1977 Explanatory Note to the rule states that this definition becomes important in determining the effect of the commencement of a class action because it "carries into effect the decision [or American Pipe, holding that] the commencement of an action as a class action suspends the applicable statute of limitations during the interim period from commencement until refusal to certify as to all putative members of the class...."

Plaintiffs seek to rely on a decision of the Pennsylvania Superior Court that held tolling continued during the pendency of the class representative's appeal. Miller v. Federal Kemper Ins. Co., 508 A.2d 1222, 1231 (Pa. Super. Ct. 1986). The district court declined to follow the Miller panel, noting the different appellate procedures followed by Pennsylvania and federal courts. Pennsylvania courts treat the denial of class certification as a final order from which an appeal may be taken immediately. Alessandro, 409 A.2d at 350. Denial of class certification by a federal court, however, is interlocutory and ordinarily not immediately appealable. Coopers & Lybrand v. Livesay, 437 U.S. 463, 470 (1978). Thus, in state court proceedings, there is some logic to continuing the tolling period while the certification decision is resolved. But in federal court, such a continuation would result in a substantial extension of the tolling period. The district court found that this distinction made application of the Superior Court's rule to cases in federal courts unreasonable. We agree.

In deciding that the Pennsylvania Supreme Court would similarly credit this distinction, we observe that, in related contexts, Pennsylvania's highest court has weighed the policies warranting application of tolling periods to statutes of limitations against the risks of diluting those statutes. "Statutes of limitations embody important policy judgments that must be taken into account in determining the scope of application of the tolling principle".

Cunningham v. Insurance of N. Am., 530 A.2d 407, 409 (Pa. 1987), cert. denied, 484 U.S. 1008 (1988). In Cunningham, the court found that filing a patently non-justiciable claim was not sufficient to toll the statute, noting:

> To hold otherwise would be to render the statute of limitations so diluted in its effect as to skirt the clear legislative policy expressed therein, and would encourage plaintiffs to sleep on their right in the hope that officious intermeddlers, who lack standing, will institute actions on their behalf.

Id. at 411.

We predict that the Pennsylvania Supreme Court would apply parallel reasoning here, and conclude that to permit tolling the statute of limitations until final resolution on appeal of all claims would disable the essential purpose of the statute and encourage plaintiffs to sleep on their rights. Accordingly, we will affirm the district court's order dismissing the claims of Cocchi and Beddingfield and striking the motions of Dick and Zyskowski to intervene.

IV.

Alternatively, Cocchi and Beddingfield assert they may evade the statute of limitations because, under Federal Rule of Civil Procedure 15(c), inclusion of their claims in the fourth amended complaint, filed five years after the demonstration and more than two years after expiration of the statute of limitations, should relate back to the filing date of the initial complaint. We disagree[3].

Federal Rule of Civil Procedure 15(c) permits amendment of a pleading to relate back to the date of the original pleading when:

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3 Because the district court did not address this argument in the opinion below, plaintiffs ask us to remand for consideration of the question. We note, however, that the general rule that a federal appellate court does not consider an issue not passed upon below is one of discretion rather than jurisdiction. Selected Risks Ins. Co. v. Bruno, 718 F.2d 67, 69 (3d Cir. 1983). We exercise that discretion here, noting that we may affirm the district court on any basis. See, e.g., Felix v. Virgin Islands Government, 702 F.2d 54, 57 (citing Bernitsky v. United States, 620 F.2d 948, 950 (3d Cir.), cert. denied, 449 U.S. 870 (1980)).

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action[4], or

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4 This provision, added in 1991, was intended to make clear "that the rule does not apply to preclude any relation back that may be permitted under the applicable limitations law" of the jurisdiction that provides the statute of limitations. 3 James W Moore et.al., *Moore's Federal Practice* ¶15.15[3.-1] (2d ed. 1995) (quoting 1991 Advisory Committee Note). According to the Advisory Committee Note, if the law providing the limitation "affords a more forgiving principle of relation back than the one provided in this rule, it should be available to save the claim". Pennsylvania does not provide a "more forgiving principle of relation back" than does federal practice. *See* Aivazoglou v. Drever Furnaces, 613 A.2d 595, 599 (Pa. Super. Ct. 1992) (adhering to the "well established rule that new parties cannot be introduced into a suit by amendment following expiration of the period of the statute of limitations"). Accordingly, this subparagraph does not save appellants' case.

> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and ... the party to be in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party....

Fed. R. Civ. P. 15(c)[5]. Relying on Varlack v. SWC Caribbean, Inc., 550 F.2d 171 (3d Cir. 1977), Cocchi and Beddingfield claim subparagraph (3) of Rule 15(c) allows the amendment, coming more than two

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5 Under Hanna v. Plumer, 380 U.S. 460 (1965), the question of relation back is procedural and therefore properly analyzed according to federal practice. 3 J. Moore, supra, ¶15,15[2].

years after expiration of the statute of limitations and naming them as plaintiffs, to relate back to the original action[6]. But for appellants' claims to relate back, all three conditions specified in Rule 15(c)(3) must be satisfied. Appellants' argument fails because they have demonstrated "a mistake concerning the identity of the proper party".

Statutes of limitations ensure that defendants are "protected against the prejudice of having to defend against stale claims, as well as the notion that, at some point claims should be laid to rest so that security and stability can be restored to human affairs". Cunningham, 530 A.2d at 409 (citations omitted). In order to preserve this protection, the relation-back rule requires plaintiffs to show that the already commenced action sufficiently embraces the amended claims so that defendants are not unfairly prejudiced by these late-coming plaintiffs and that plaintiffs have not slept on their rights.

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6 In Varlack, we held that replacement of a "John Doe" caption with a party's real name amounted to "changing a party", warranting application of Rule 15(c). Varlack v. SWC Caribbean, Inc., 550 F.2d 171, 174 (3d Cir. 1977).

Where the effort is to add new parties, courts apply subparagraph (3), and inquire whether the defendants (A) received such notice that they will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought with the original claims[7].

The emphasis of the first prong of this inquiry is on notice. "[T]he `prejudice' to which the Rule refers is that suffered by one who, for lack of timely notice that a suit has been instituted, must set about assembling evidence and constructing a defense when the case is already stale".

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7 The Committee Note to the 1966 Amendment to the rule advises,

> The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier [than that of amendments changing defendants]. Again the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs.

Curry v. Johns-Manville Corp., 93 F.R.D. 623, 626 (E.D. Pa. 1982). Because Cocchi and Beddingfield allege injury by the same conduct described in the original pleading, the evidence relevant to a defense against these new claims would be the same as the evidence relevant to a defense against the original claims. Hence, Cocchi and Beddingfield satisfy the first prong of Rule 15(c).

On the second prong, however, the new complaint fails. Defendants did not know, nor should they have known before the expiration of the limitations period that, but for a mistake, the would have been sued directly by these plaintiffs. The Court of Appeals for the District of Columbia Circuit has noted that without some limit relation-back:

> would allow the tardy plaintiffs to benefit from the diligence of the other victims and, more importantly, could cause defendants' liability to increase geometrically and their defensive strategy to become far more complex long after the statute of limitations had run. Even if, as here, there were no showing of specific prejudice in the sense of lost or destroyed evidence, defendants would still be deprived of their interest in repose. At some point, defendants should have notice of who their adversaries are.

Leachman v. Beech Aircraft Corp., 694 F.2d 1301, 1309 (D.C. Cir. 1982)[8]. Cocchi and Beddingfield had ample time -- the time dictated by the relevant statute plus the

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8 This is not a case where plaintiffs merely sought to substitute a real party in interest. See Staren v. American Nat. Bank & Trust Co., 529 F.2d 1257. 1263 (7th Cir. 1976) ("The substitution of such parties after the applicable statute of limitations may have run is not significant when the change is merely formal and in no way alters the known facts and issues on which the action is based"); 6A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure §1501 (1990) (citing cases permitting amendments that substitute new plaintiffs to relate back if the added plaintiffs are real parties in interest). The Advisory Committee Note to the 1966 Amendment to Rule 15 noted the relevance of Rule 17(a), authorizing substitution of real parties in interest, to Rule 15(c). But the Committee Note to the 1966 Amendment to Rule 17(a) cautioned that the provision permitting substitution of plaintiffs should not be "misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made". Neither condition is met here.

generous period of time during which the statute was tolled -- in which to file their claims. It is not disputed that Cocchi and Beddingfield were aware of their right to bring these claims. Nevertheless, they failed to add their names to the complaint until after expiration of the statute of limitations. They have not demonstrated that this failure was due to mistake.

Although the relation-back rule ameliorates the effect of statutes of limitations, 6A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* §1497, it does not save the claims of complainants who have sat on their rights. Here, Cocchi and Beddingfield seek to take advantage of the rule to perform and end-run around the statute of limitations that bars their claims. We will affirm the district court's dismissal of their claims.

V.

For the foregoing reasons we will affirm the district court's dismissal of the claims of Cocchi and Beddingfield and its order striking the motion to intervene of Dick and Zyskowski.

A True Copy:
Teste:

Clerk of the United States
Court of Appeals for the
Third Circuit

pbg9508a&b

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 91-0316

TAMMY NELSON (J.D. #10);
ARLEIGH EDDY (J.D. #17);
IDA KAUFMAN (J.D. #26);
SANDY SAUNDERS (J.D. #47);
DONNA SKUTA (J.D. #52)

Plaintiffs,

-against-

COUNTY OF ALLEGHENY, CITY OF PITTSBURGH, CHARLES KOZAKIEWICZ, Warden of the Allegheny County Jail; and MAYER DeROY, Assistant Chief of the City Lock-Up, being sued in their official and individual capacities,

Defendants.

OPINION

AND NOW, this 15th day of August, 1994, after consideration of the motion of defendants, County of Allegheny, City of Pittsburgh, Charles Kozakiewicz and Mayer DeRoy, to dismiss plaintiffs' fourth amended complaint and for sanctions, and also of the motion of defendants to strike the motion to intervene of Judy Dick and Valerie Zyskowski,

IT IS ORDERED that the motion to dismiss with respect to the claims of Janet Cocchi and Mary Beddingfield be and hereby is granted on the basis that such claims are untimely and barred by the applicable statute of limitations.

IT IS FURTHER ORDERED that the motion to strike the motion to intervene of Dick and Zyskowski be and hereby is granted on the basis that the claims of the proposed intervenors are untimely and barred by the applicable statute of limitations.

IT IS FURTHER ORDERED that the motion of defendants for sanctions be and hereby is denied.

IT IS FURTHER ORDERED that the remaining plaintiffs shall resubmit their fourth amended complaint eliminating all class allegations and claims which have heretofore been dismissed within twenty (20) days of the date of this order. Defendants shall file an answer to the

fourth amended complaint within twenty (20) days of the date of filing.

Donald E. Ziegler
Chief Judge

Filed August 15, 1994

cc: Counsel of Record

alw\pbg9502a&b

Filed August 15, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action
No. 91-0316

TAMMY NELSON (J.D. #10);
ARLEIGH EDDY (J.D. #17);
IDA KAUFMAN (J.D. #26);
SANDY SAUNDERS (J.D. #47);
DONNA SKUTA (J.D. #52);

Plaintiffs,

-against-

COUNTY OF ALLEGHENY, CITY OF PITTSBURGH, CHARLES KOZAKIEWICZ, Warden of the Allegheny County Jail; and MAYER DeROY, Assistant Chief of the City Lock-Up, being sued in their official and individual capacities,

Defendants.

OPINION

ZIEGLER, Chief Judge

Pending before the court is the motion of defendants, County of Allegheny, City of Pittsburgh, Charles Kozakiewicz, and Mayer DeRoy, to dismiss in part plaintiffs' fourth amended complaint. Also pending is defendants' motion to strike the motion of Judy Dick and Valerie Zyskowski to intervene as party plaintiffs.

This civil action arises out of the allegedly unlawful treatment of anti-abortion demonstrators by employees of the County of Allegheny and City of Pittsburgh during and following their arrests on March 11, 1989. The action was originally brought as a class action by Amnesty America, in its representational capacity, on behalf of Jane Does Nos. 1 through 60, and by four individual Jane Does numbered 10, 17, 26 and 52 asserting their individual claims. On December 10, 1991, plaintiffs filed a third amended complaint in which Jane Does 37 and 47 also joined. By previous orders of this court, Amnesty America has been dismissed as a representative of the class and certification has been denied. Moreover, all claims except those made pursuant to 42 U.S.C. §1983 have been dismissed, and all anonymous Jane Does wishing to proceed with individual claims have been required to provide their identity to the defendants.

Plaintiffs' fourth amended complaint, which was filed March 17, 1994, lists as plaintiffs five of the six Jane Does who were named in the third amended complaint[1] and adds two more plaintiffs, Janet Cocchi (J.D. #12) and Mary Beddingfield (J.D. #7). In addition, Judy Dick (J.D. #16) and Valerie Zyskowski (J.D. #60), filed a joint motion to intervene as party plaintiffs on May 31, 1994.

Defendants have moved to dismiss the claims of Cocchi and Beddingfield and have also moved to strike the motion to intervene. Because we hold that the claims of Cocchi, Beddingfield, Dick and Zyskowski are untimely and are barred by the applicable statute of limitations, we will grant defendants' motions with respect to these claims. We will also require the remaining plaintiffs to amend their complaint to delete all class allegations as well as all claims which have been previously dismissed.

Although plaintiffs' §1983 claims are federal law claims, it is settled that there is no federal statute of limitations applicable to §1983 claims, and both the limitations period and the applicable tolling period, if any must be derived from state law. Chardon v. Fumero Soto, 462 U.S. 650, 655 (1983); 42 U.S.C. §1983.

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[1] Jane Do No. 37 has chosen to voluntarily dismiss her claim.

We agree with the parties that Pennsylvania's two-year statute of limitations is applicable to plaintiffs' claims. 42 Pa. C.S.A. §5524. Thus, absent a tolling period, the limitations period on all §1983 claims arising out of the March 11, 1989 arrests would have run by March 11, 1991.

The instant dispute arises out of a rather nebulous area of the law, to-wit, the application of a tolling period to claims of putative class members. In American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), the Supreme Court, applying federal law, held that the filing of a class action complaint tolled the limitations period for all putative class members. The "American Pipe rule" has been adopted, at least in principle, by the Pennsylvania courts. Alessandro v. State Farm Mutual Ins. Co., 409 A.2d 347, 350, n. 9 (Pa. 1979) (citing American Pipe); see also, the Explanatory Note to Pa. R.C.P. 1701 ("[Rule 1701] carries into effect the decision of the United States Supreme Court in [American Pipe]") (brackets supplied). The parties are in agreement that the tolling period commenced on February 21, 1991 (eighteen days before the expiration of the limitations period), the date the original class action complaint was filed. However, the crux of the controversy emanates from the polar views of the parties regarding the length of the tolling period and the resultant effect on the statute of limitations.

The issue to be resolved is whether the tolling period terminates upon the filing of an order by the district court denying certification of a class of plaintiffs, or whether it continues to toll the limitations period until the appeal process on the certification issue has run its course. This issue has become the focal point of the parties because, on November 22, 1991, plaintiffs' motion to certify a plaintiff class was denied by this court as untimely pursuant to former Local Rule 34(c)[2].

The Supreme Court addressed the identical issue, albeit under federal law, in American Pipe. In that case, the State of Utah commenced a Sherman Act action in district court against the defendant construction company in which the State purported to represent a class of various state and local agencies. The class action complaint was filed eleven days before the expiration of the limitations period. Upon motion of the defendant, the district court ruled that the suit could not be maintained as a class action on the basis that the class was not so numerous as to make joinder impracticable. Eight days after the order denying certification of a class, various state and local agencies moved to intervene in the action.

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[2] Former Local Rule 34(c) required that the class representatives move for certification within 90 days of the filing of the complaint.

The district court denied the motions and concluded that they were timely.

The Court of Appeals reversed and the Supreme Court affirmed. A unanimous Court held that the filing of the class action complaint tolled the limitations period with regards to the claims of the putative class members attempting to intervene. In holding that the motions to intervene were timely, the Court ruled "that the commencement of the class action in this case suspended the running of the limitation period only during the pendency of the motion to strip the suit of its class action character". Id. at 561. Thus, the Court held that the intervenors had eleven days after the entry of the order decertifying the class within which to intervene. The motions to intervene were timely because they were filed eight days after entry of the order. Id.

We hold that, pursuant to American Pipe, the tolling period merely suspended the running of the limitations period during the pendency of this class action, and upon decertification of the class, class members had only eighteen days to intervene or join in the action, or to bring separate actions. Thus, we hold that the claims of the two plaintiffs attempting to join the action by way of the fourth amended complaint, Cocchi and Beddingfield, and the two proposed intervenors, Dick and Zyskowski, are time-barred and they will be dismissed.

In reaching our conclusion, we are mindful of the central purposes underlying the application of limitations periods. As recognized by the Pennsylvania Supreme Court, limitations periods ensure that defendants are "protected against the prejudice of having to defend against stale claims, as well as the notion that, at some point, claims should be laid to rest so that security and stability can be restored to human affairs". Cunningham v. Ins. Co. of North America, 530 A.2d 407, 409 (Pa. 1987). Furthermore, the Court of Appeals stated in National Iranian Oil Co. v. Mapco International, Inc., 983 F.2d 485, 493 (3d Cir. 1992) (citing American Pipe), that "the right [of defendants] to be free of ... stale claims must eventually prevail over the right to prosecute them". (brackets supplied).

We also take particular note of Justice Blackmun's concurring opinion in American Pipe in which he cautioned that the tolling period "must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights". 414 U.S. at 561. Likewise, in a concurring opinion to Crown, Cork & Seal Co., Inc. v. Parker, 462 U.S. 345, 354 (1983), Justice Powell cited Justice Blackmun's concurring opinion in American Pipe and warned that "[t]he tolling rule of American Pipe is a generous one, inviting abuse". See also, Cunningham, 530 A.2d at 410 (recognizing the potential for abuse of the American Pipe rule).

In the instant action, Cocchi and Beddingfield did not attempt to join the action until the filing of the fourth amended complaint on March 17, 1994, over five years after their arrests and nearly two and one-half years after class certification was denied. Dick and Zyskowski filed their motion to intervene two and one-half months later. These individuals have provided no explanation for their late filings and we can only conclude that they have been significantly lax in asserting their rights. We will not encourage these plaintiffs or other class members to sit on their rights by extending the tolling period.

Plaintiffs urge the court to adopt the rule that the tolling period for the statute of limitations does not end until after all avenues of appeal on the certification issue have been exhausted. Moreover, plaintiffs contend that, upon conclusion of the tolling period, the limitations period is renewed so that putative class members have two years from the date of the final disposition on appeal to file their claims. We decline to adopt such an expansive interpretation of the tolling period.

Applying the tolling period in the manner suggested by plaintiffs would run counter to the objectives underlying limitations periods and would encourage plaintiffs to act in a dilatory fashion. Because the order denying certification of

the class is, under federal law, interlocutory and not immediately appealable, see Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), plaintiffs cannot appeal from the order until the trial has concluded and a final judgment has been entered. Assuming that an appeal is filed, it is conceivable, if not probable, that the appeal process will continue until 1996 or later. Plaintiffs then submit that the two-year limitations period would begin anew. Under this scenario, a putative class member could file a complaint in 1993 or later and assert claims against the defendants for the allegedly illegal acts that occurred in 1989. In effect, by the filing of the original class action complaint, all putative class members would enjoy a nearly ten year limitations period in which to bring their claims.

We are hesitant to adopt any tolling rule which can be so readily manipulated by one party to the prejudice or another. Under plaintiffs' version of the tolling rule, the length of the tolling period could be extended by refusing to seek an interlocutory appeal and by appealing the certification issue to the Supreme Court. Thus, depending on plaintiffs' litigation tactics, the tolling period could end immediately after the conclusion of the trial or possibly not until four or five years later, after all appeals have been exhausted. We submit that the termination of defendants' exposure to the claims of putative class members should not hinge on the legal maneuverings of the representative plaintiffs.

We note that the Pennsylvania Supreme Court has not directly ruled on the issue although, as rehearsed, the court has recognized the inherent potential for abuse of the tolling rule. Cunningham, 530 A.2d at 410. In Cunningham, the court noted that:

> Application of the rule tolling in American Pipe and its progeny was based upon a need to promote efficiency and economy of litigation, recognizing that, unless tolling were afforded, class members would not be able to rely on the existence of the suit to protect their rights.

Id. (citing to Crown, Cork & Seal Co., 462 U.S. at 350). In our view, however, once certification has been denied by the district court, class members cannot reasonably rely on the existence of the suit to protect their rights, and they must timely assert claims in their individual capacities. Our conclusion is supported by the case of Alessandro v. State Farm Mutual Automobile Ins. Co., 409 A.2d 347 (Pa. 1979), wherein the court stated *in dicta* that the statute of limitations is suspended for class members only during the time that they are allegedly parties to the class action. Since, under Pennsylvania's class action rules, a class action is defined as "any action brought by or against parties as representatives of a class until the court by order refuses to

certify it as such or revokes a prior certification under these rules, Pa. R.C.P. 1701 (emphasis supplied), it follows that class members are only allegedly parties to the action until the trial court denies certification. We therefore predict that the Pennsylvania Supreme Court would restrict the tolling period in the manner outlined above.

In reaching our conclusion, we decline to follow the holding of a panel of the Pennsylvania Superior Court in Miller v. Federal Kemper Ins. Co., 508 A.2d 1222 (Pa. Super. 1986), which held that the tolling period continues throughout the pendency of an appeal. We do so by noting that the application of Pennsylvania case law to the instant dispute is problematic because Pennsylvania courts apparently treat the denial of class certification as a final order from which an appeal; may be taken by the putative class members. Alessandro, 409 A.2d at 350, n. 9. Thus, as in Miller, the appeal process in state court is accelerated compared to federal appeals of the same issue, and the tolling of the limitations period during the appeal process does not have as profound an effect on the former as it does on the latter. Moreover, as rehearsed, we believe that the Pennsylvania Supreme Court would reject any attempt to broaden the American Pipe rule.

Finally, plaintiffs' reliance on United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977), is misplaced. In that

case, after final judgment had been entered but within the period allowed for appeal, a putative class member attempted to intervene in the action for the sole purpose of appealing the district court's denial of class certification. The Supreme Court held that the class member's attempt to intervene was not time-barred and that she would be permitted to intervene to raise the appeal. That case does not, as plaintiffs contend, suggest that the plaintiff could have intervened to assert her individual claims. It stands only for the proposition that a putative class member may intervene for the limited and specific purpose of appealing the decertification order[3]. Thus, the claims of the plaintiff in United Airlines only survive as part of the class action and only if the decertification order is reversed on appeal.

Pursuant to our analysis, we hold that the bar date for §1983 claims arising out of the March 11, 1989 arrests is December 10, 1991, eighteen days after class

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[3] We decline to express an opinion on whether the Pennsylvania Supreme Court has or would adopt the rule set forth in United Airlines as that issue is not relevant to the instant motion.

certification was denied[4]. We further hold that the individual claims of Janet Cocchi, Mary Beddingfield, Judy Dick and Valerie Zyskowski are time-barred. We will therefore dismiss the claims of Cocchi and Beddingfield in the fourth amended complaint and strike the motion of Dick and Zyskowski to intervene.

We will also require the remaining plaintiffs to resubmit the fourth amended complaint eliminating all class action allegations and all claims that have heretofore been dismissed. The elimination of such allegations and claims is not to be construed as a waiver of the plaintiffs' right to appeal the previous orders of this court. It is merely intended to clarify the current status of the case and eliminate the confusion emanating from the convoluted document currently of record. Defendants will be required to file an answer to the streamlined fourth amended complaint within twenty days after filing.

Defendants have also moved for sanctions. We find that sanctions are inappropriate based on our conclusion that the

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[4] We find no support for plaintiffs' contention that the limitations period begins anew following the termination of the tolling period in light of the Cunningham and Alessandro opinions. In any event, even were we to hold that the limitations period began anew after certification was denied on Novemb 22, 1991, the claims of the four individuals who are the subject of this motion would still be untimely.

plaintiffs have neither ignored nor willfully attempted to circumvent the orders of this court, and we will therefore deny defendants' request. Because of our holdings, we need not address the remaining contentions raised by defendants in their motion.

An appropriate order will follow.

Dated: August 23th 1994

Donald E. Ziegler
Chief Judge

alw/pbg9501a&b

Supreme Court, U.S.
FILED
FEB 16 1996
CLERK

No. 95-1141

In The

Supreme Court of the United States

October Term, 1995

MARY BEDDINGFIELD, JANET COCCHI, JUDY DICK and VALERIE ZYSKOWSKI,

Petitioners,

v.

COUNTY OF ALLEGHENY, CITY OF PITTSBURGH, CHARLES R. KOZAKIEWICZ and MAYER DEROY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION OF RESPONDENTS

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QUESTION PRESENTED

Does a Federal Court sitting in diversity err in applying the law as stated by the highest court of the state whose law is being applied rather than the law as stated by an intermediate appellate court in the same jurisdiction?

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OPINIONS AND JUDGMENTS IN THE COURTS BELOW

The Opinion of the United States District Court for the Western District of Pennsylvania authored by Chief Judge Donald E. Ziegler is reported at 860 F.Supp. 1080. Further, the decision of the United States Court of Appeals for the Third Circuit authored by Judge Scirica and joined by Judge Becker and Judge Wood, is reported at 60 F.3d 1010. Both of these Opinions are reproduced in the Appendix to the Petitioners' Petition for Writ of Certiorari.

COUNTER-STATEMENT OF THE CASE

On March 11, 1989, nearly seven years ago, Petitioners, professional pro-life protesters, participated in a demonstration. They were arrested, detained at the City of Pittsburgh lock-up, the Allegheny County Jail and Mayview State Hospital and were subsequently released. The Petitioners have alleged that their civil rights were violated during this process. Specifically, they allege that they were sexually harassed and treated with excessive force.

Approximately two years later this action was commenced by the filing of a Complaint which was amended prior to service upon the Defendants. The Amended Complaint was filed on February 21, 1991, precisely eighteen days prior to the expiration of the applicable statute

of limitations.[1] Motions to Dismiss filed on behalf of certain Defendants were timely filed. At that time, the Petitioners proposed a class certification and sought conversion of the Motions to Dismiss to Motions for Summary Judgment pursuant to F.R.C.P. 56.

In the interim, Petitioners' request for class certification of a plaintiff class was denied on November 22, 1991 due to the failure of Petitioners' counsel to timely seek such certification. At the time the Order was entered, the District Court cautioned Petitioners' counsel that all individuals desiring to file claims should act promptly due to the pending expiration of the statute of limitations. No appeal has ever been taken from that Order.

The Petitioners, rather, filed a Second Amended Complaint on December 9, 1991 setting forth allegations against a defendant class. This Defendant class included unidentified "Moe" Defendants previously dismissed by Order of Court and, conceivably other County employees not identified in the prior Complaints. Service of the Second Amended Complaint was made upon counsel for the County, the Warden of the County Prison, the City and Mayer DeRoy, the City's Chief of Police, through counsel who appeared of record. No attempt at service upon any of the Moe Defendants was effectuated. These individuals have never been identified on the record by the Petitioners. For all practical intents and purposes

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[1] Pennsylvania law provides for a two-year statute of limitations period for personal injury claims. 42 Pa.C.S. § 5524. This two-year statute of limitations is applicable to the Petitioners' 42 U.S.C. § 1983 claims pursuant to *Board of Regents v. Tomanio*, 446 U.S. 478 (1980).

there is no record of any County employee, other than the Warden, having received notice of this action at any time.

Subsequently, and pursuant to Court Order, Petitioners filed a Third Amended Complaint on January 10, 1992. The Plaintiffs identified in the Third Amended Complaint included Amnesty America[2] suing in its representative capacity on behalf of certain Jane Doe plaintiffs.

The County Defendants filed a Motion to Dismiss the Third Amended Complaint. On April 23, 1993, Chief Judge Donald E. Ziegler entered an Order addressing the issues raised by the Defendants' Motions to Dismiss as well as the Petitioners' request for Defendant class certification.

The Court's April 23, 1993 Order denied Petitioners' Motion for Certification of the Defendant class, on the basis that the Petitioners could not meet the requirements for certification pursuant to F.R.C.P. 23(a) and (b)(3).

By Order of Court dated February 17, 1994, the District Court compelled the Petitioners to file a Fourth Amended Complaint identifying with specificity the identity of six women who were to proceed in their individual capacities. On or about March 17, 1994, the Plaintiffs filed a Fourth Amended Complaint which amended the captioned to specifically identify five

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[2] Amnesty America is a self-described "propriety organization" owned and operated by an individual by the name of Richard Bruno and is "devoted exclusively to ensuring the protection of the civil rights of and assistance to pro-life demonstrators in the criminal justice system in the United States of America." Third Amended Complaint at ¶ 4.

women who were proceeding in this individual capacity. In addition, the Fourth Amended Complaint listed two additional Plaintiffs: two of the Petitioners, Janet Cocchi and Mary Beddingfield, who had not previously been identified as individual Plaintiffs. Further, the Fourth Amended Complaint asserted claims previously dismissed by various Order of Court, including the reassertion of Defendant class allegations and claims on behalf of Amnesty America.

On or about May 31, 1994, a Motion to Intervene was filed on behalf of the other two Petitioners Judy Dick and Valerie Zyskowski. The Motion to Intervene lacked a supporting Brief and was deficient in both form and substance under F.R.C.P. 24. In response to the attempt by the Petitioners to improperly expand the parties to this action, the Defendants filed a Motion to Dismiss/Motion for Sanctions to the Fourth Amended Complaint. The Motion sought the dismissal of Cocchi's and Beddingfield's claims based on the expiration of the applicable statute of limitations.

Additionally, the Defendants filed a Motion to Strike the Motion for Intervention asserting that the applicable statute of limitations had long expired and the Motion to Intervene was procedurally defective. In an Opinion and Order dated August 15, 1994, Chief Judge Ziegler addressed both such Motions.

The District Court reviewed the procedural background of the case in evaluating the Defendants' claims of untimeliness with respect to the Petitioners' attempts to join the lawsuit. The Court ruled that the joinder was untimely and barred by the expiration of the applicable

two-year period of limitations. In so holding, the District Court thoroughly reviewed Pennsylvania case law addressing the tolling effect of a class action lawsuit with respect to the claims of putative class members. The Court properly concluded that the filing of a class action lawsuit merely suspended the applicable statute of limitations during the pendency of the class. Once certification was denied or revoked, the statute of limitations was no longer tolled. Based on this holding, the Petitioners' claims expired December 16, 1991. In fact, counsel was advised by the Court that the applicable statute of limitations would expire on this date at the time of the decision denying their certification as a class. The subsequent filing of the Petitioners' actions, two years after the Court's Order and warning was untimely.

The Petitioners filed a Notice of Appeal of the District Court's August 15, 1994 Order to the United States Court of Appeals for the Third Circuit. By Opinion and Order issued July 18, 1995, the Third Circuit affirmed the District Court's decision.

ARGUMENT IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI

The Decision of the Third Circuit Court of Appeals Applying Pennsylvania Law does not Conflict with Decisions of this Court.

The decision of the Third Circuit Court of Appeals affirming the District Court's grant of the Defendants' Motion to Dismiss does not conflict with decisions of this Court. The Petitioners rely on this Court's decision in

Fidelity Union Trust Company v. Field, 311 U.S. 169 (1940) in arguing that such a conflict does exist. In *Fidelity Union Trust Company*, this Court held that:

> The highest state court is the final authority on state law . . . , but it is still the duty of the federal courts, where the state law supplies the rule of decision, to ascertain and apply that law even though it has not been expounded by the highest court of the state. An intermediate state court in declaring and applying the state law is acting as an organ of the state and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question.

Fidelity Union Trust Company, 311 U.S. at 177 (citations omitted).

In concluding that the statute of limitations in Pennsylvania is not tolled during the pendency of an appeal from an order denying class certification, the District Court and Circuit Court properly applied the law as stated by the Pennsylvania Supreme Court, the Commonwealth's highest state Court.

A. Pennsylvania Supreme Court's Decision in *Cunningham*

In *Cunningham v. Insurance Company of North America*, 515 Pa. 486, 530 A.2d 407 (1987), the Pennsylvania Supreme Court set forth its most precise discussion regarding the impact of a class action upon the statute of limitations for the individual class members. There, the insureds brought a class action against a single insurer seeking to recover postmortem work loss benefits

through no-fault automobile insurers. Prior to the filing of the *Cunningham* action, a similar class action had been filed in *Nye v. Erie Insurance Exchange*, 504 Pa. 3, 370 A.2d 98 (1983). The *Nye* class action was decertified prior to the filing of the *Cunningham* action. The defendant insurer moved for summary judgment arguing that the *Cunningham* claim was barred by the expiration of the applicable statute of limitations. The trial court granted the defendants' motion rejecting the plaintiffs' contention that the class action in *Nye* tolled the statute of limitations. The Pennsylvania Superior Court, an intermediate appellate court, reversed finding that the *Nye* action in fact tolled the statute of limitations period. *Brunda v. Home Insurance Company*, 353 Pa.Super. 146, 509 A.2d 377 (1985). The Pennsylvania Supreme Court granted allocatur and reversed.

The Pennsylvania Supreme Court restated the principle that the filing of a class action normally tolls the statute of limitations for all putative plaintiffs in the class. Further, the Court recognized that the tolling issue becomes important once the certification of the class action occurs. While the decertification in *Nye* resulted from the fact that the representative lacked standing to bring the action, the Supreme Court's analysis of the effect of decertification is compelling and relevant to the issue which was presented to the District Court and the Third Circuit in this case.

The Pennsylvania Supreme Court recognized the inherent unfairness in unilaterally extending the tolling effect of a class action once the class has been decertified.

Such a result would work injustice to the general principles supporting the creation of statutes of limitations. The Court noted:

> Statutes of limitations embody important policy judgments that must be taken into account in determining the scope of application of the tolling principle. Those policy judgments include a belief that defendants should be protected against the prejudice of having to defend against stall claims, as well as the notion that, at some point, claims should be laid to rest so that security and stability can be restored to human affairs. The defense of the statute of limitations is not a technical defense but rather is a substantial and meritorious one, and has been regarded as favored in the law and advancing the welfare of society.

530 A.2d at 409.

In setting forth these policy considerations, the Supreme Court cited two of its prior decisions: *Insurance Company of North America v. Carnahan*, 446 Pa. 48, 284 A.2d 728 (1981) and *Schmucker v. Naugle*, 426 Pa. 203, 231 A.2d 121 (1967).

Additionally, the Court discussed and approved of the rationale supporting this Court's decision in *American Pipe and Construction Company v. Utah*, 414 U.S. 538 (1974) and its progeny. The *Cunningham* Court found that this case law:

> . . . was based upon the need to promote efficiency and economy of litigation, recognizing that, unless tolling was afforded, class members

> would not be able to rely on the existence of the suit to protect their rights.

530 A.2d at 410.

However, the Court also recognized the threat of abuse of such a rule and adopted the well-reasoned rationale of Mr. Justice Blackmun in his concurring opinion in *American Pipe*:

> Our decision . . . must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally to attract and save members of the purported class who have slept on their rights.

Id., citing American Pipe.

Finally in its analysis, the *Cunningham* Court noted that counsel for plaintiff was the same counsel on behalf of the putative class in *Nye* and that the *Nye* complaint sought a class action against thirty-one insurers even though the plaintiffs' counsel represented a single insured in an attempt to toll the statute of limitations as to all carriers. The Court recognized that counsel was attempting to protect many potential plaintiffs with claims against the thirty other insurers who would not otherwise act upon their rights prior to the expiration of the applicable statute of limitations. The Court disapproved of this tactic to toll the statute stating:

> We regard such an action as a clear abuse of the goals of class action procedures. The procedures do not exist to sanction what would be regarded by many as a course of officious intermeddling on the part of counsel, who, motivated by concern for plaintiffs who would not otherwise file suits, has embarked on a course of initiating

> litigation on behalf of those who have slept on their rights. Indeed, this case presents a most compelling example of tactics employed to subvert the legislative intent embodied in the statute of limitations, and the rules governing tolling will not be extended to give effect to such tactics.

530 A.2d at 410.

The conduct of plaintiff's attorney in *Cunningham* which the Pennsylvania Supreme Court found so offending and improper is virtually indistinguishable from the course charted by the Petitioners' counsel in this case. The filing of the initial class action was simply an attempt to protect the rights of those women with no express interest in proceeding with individual cases. It is undisputed that Petitioners' counsel discussed this matter with many of the purported class members prior to the initial filing of the lawsuit. In fact, Plaintiff secured Affidavits from many members of the putative class. (See Appendix to Amended Complaint.) Recognizing that the statute of limitations was running quickly and only receiving commitments from, at that time, four individuals to proceed in their own right, Plaintiff's counsel simply concocted a class action in order to invoke the umbrella of protection generally afforded putative class members and thereby buying time to entice more women into pursuing the litigation. Contrary to the assertions of the Petitioners, this type of activity has been specifically addressed by the Pennsylvania Supreme Court and rejected as improper.

Petitioners' argument fails to address the clear import of *Cunningham* and seeks to manipulate a decision

of an intermediate Pennsylvania appellate court in an effort to persuade this Court that the Third Circuit has ignored this Court's holding in *Fidelity Union & Trust.*

B. Pennsylvania Rule of Civil Procedure 1701

Further evidence of the Pennsylvania Supreme Court's rule with regard to the tolling of the period of limitations in class action cases is demonstrated by Pennsylvania Rule of Civil Procedure 1701. In Pennsylvania, the General Assembly has vested the Supreme Court with the power to prescribe by general rule the practice and procedure in civil actions for the courts of common pleas. Act of June 21, 1937, P.L. 1982, *as amended* 17 P.S. § 61 et seq. (repealed). This concept was incorporated into the Constitution of 1968, Article V, Section 10(c) which continued to vest in the Supreme Court, "the power to prescribe general rules governing practice, procedure and the conduct of all courts. . . . " This constitutional provision is now implemented by Section 1722 of the Judicial Code, 42 Pa.C.S. § 1722.

Pennsylvania Rule of Civil Procedure 1701 provides:

> (a) As used in this chapter
>
> 'Class action' means any action brought by or against parties as representatives of a class until the court by order refuses to certify it as such or revokes a prior certification under these rules.
>
> (b) Except as otherwise provided in this chapter, the procedure in a class action shall be in accordance with the rules governing the form of action in which relief is sought.

An explanatory note to Rule 1701 recognizes that the definition of the term class action incorporates this Court's decision in *American Pipe*.

> This definition becomes important in determining the effect of the commencement of a class action as tolling the statute of limitations as to the members of the class other than the named representative. It carries into effect the decision of the United States Supreme Court in *American Pipe and Construction Company v. State of Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), in which the court held that the commencement of a class action *suspends* the applicable statute of limitations during the interim period from commencement until refusal to certify as to all putative members of the class who would have been parties if the action had been certified as such.

(Emphasis added.)

It is undisputed that under Pennsylvania law the filing of a class action simply suspends the running of the applicable statute of limitations until the class certification issues are resolved. Once certification is denied, the applicable statute of limitations continues to run from the date of the decision on class status.

The Pennsylvania Supreme Court has clearly indicated its position with regard to this question both in *Cunningham* and its promulgation of Pennsylvania Rule of Civil Procedure 1701. The Petitioners' reliance on the decision of an intermediate appellate court in Pennsylvania is, therefore, erroneous. The United States District Court for the Western District of Pennsylvania and the United States Court of Appeals for the Third Circuit

properly adhered to this Court's holding in *Fidelity Union Trust* and, in applying Pennsylvania law, relied on principles enunciated by the highest court of Pennsylvania, its Supreme Court.

CONCLUSION

For the foregoing reasons, the Respondents contend that the decision of the United States Court of Appeals for the Third Circuit was in full accordance with the decisions of this Court. The Respondents, therefore, respectfully request that this action be concluded and that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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